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IN THE

Supreme Court of the United States

APRIL TERM, 1977

No. 76-1391

HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Petitioner,

versus

BENITO LOPEZ, EGAN OLDENDORF and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Hoffman Rigging and Crane Service, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion and amended judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on the 9th day of December, 1976.

Opinions Below

The attorneys for Egan Oldendorf, Cichanowicz & Callan, Victor S. Cichanowicz of counsel, have stipulated with the attorneys for Hoffman Rigging and Crane Service,

Inc., Hill, Betts & Nash, Robert S. Blanc of counsel, that the opinion of the Court of Appeals, the amended judgment of the Court of Appeals, the order denying Egan Oldendorf's petition for rehearing and the excerpts from the transcript of trial printed in Egan Oldendorf's petition for certiorari are incorporated by reference in Hoffman Rigging and Crane Service, Inc.'s petition for certiorari.

Jurisdiction

The judgment and opinion and amended judgment of the Court of Appeals for the Second Circuit were entered on December 9, 1976. Egan Oldendorf's timely petition for rehearing was denied on January 10, 1977, and Hoffman Rigging and Crane Service, Inc's petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Was the Court of Appeals in error in denying the claim of Hoffman Rigging and Crane Service, Inc., that the operator of the crane, which it leased together with the crane personnel to International Terminal Operating Co., Inc., was the borrowed servant of ITO, and that for that reason Hoffman could not be held liable to any party for any negligence of the crane operator.

Statement of the Case

This case arises out of an accident on board M/V JOBST OLDENDORF, a vessel owned by Egan Oldendorf, in which a longshoreman was injured at the beginning of the discharge of a cargo of steel I-beams from the No. 1 hatch of said vessel. A stevedore, International Terminal Operating Co., Inc., was in charge of the discharge of the steel

beams from the vessel and rented from Hoffman Rigging and Crane Service, Inc., the crane company, a crane and its personnel in connection with the discharge. ITO directed the positioning of the crane boom over the hatch. ITO's signalman directed the operations of the crane by hand signals from the deck of the vessel to the crane operator on the dock.

After the longshoremen had made up a draft of steel I-beams and hooked it to the cargo hook of the crane, the signalman signaled the crane operator to raise the draft. The operator took the strain on the load and the signalman continued to signal him to raise the draft. The operator paused, the signalman looked at him and the operator signaled to the signalman that the operator was going to raise the head of the boom, which he did. After he gave the signalman the topping signal, the signalman did not signal the crane operator to stop at that immediate time. The operator raised the draft and topped the boom. The next signal he received from the signalman was to stop about 15 seconds later. During that time the first draft of steel beams dragged across the other steel beams from offshore to inshore, taking 15 seconds, during which the signalman gave the crane operator no signal to stop. The draft dislodged an I-beam which fell and struck the injured longshoreman's leg.

The longshoreman's action against the shipowner was tried to a jury which found that the lashings and chocks by means of which the cargo of steel I-beams had been secured during the ocean voyage had been removed prior to the commencement of the discharging operation and that this did not render the vessel unseaworthy, but that the shipowner was negligent. It assessed damages at $365,000.00 but reduced them by 15% to $310,250.00 because it found that the injured longshoreman was contributorily negligent in that percentage.

All claims between the shipowner, the stevedore and the crane company were tried solely to the Court which,

following the jury verdict, denied the longshoreman's motion to amend the complaint to allege a claim against the crane company, but later reversed itself and granted the motion to amend the complaint against the shipowner by adding the crane company as a defendant.

After the shipowner rested on the third-party claims, the Trial Court granted it indemnity against the stevedore and, on the completion of the testimony in the amended complaint against the shipowner and the crane company, the Trial Court found that the crane operator was negligent and that the shipowner and the crane company were liable to the longshoreman and awarded recovery against the shipowner and the crane company jointly and severally for the damages as assessed by the jury. The Trial Court awarded the shipowner, if it paid the judgment, indemnity against the stevedore and the crane company, each for 50%, and awarded the crane company, if it paid the judgment, recovery from the stevedore for 50%. The Trial Court dismissed the stevedore's cross claim against the crane company for indemnity or for contribution.

All parties filed notices of appeal from the final judgment, but the longshoreman's appeal was subsequently withdrawn.

The shipowner appealed on the ground that as a matter of law it was error to submit the case to the jury because neither under the warranty of seaworthiness nor the theory of negligence was a shipowner obligated to furnish an accident-free ship, and because under this Court's decision in *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971), a shipowner is not liable for a wholly unforeseeable act of negligence of a third party. It also urged that the jury's findings of negligence and seaworthiness were inconsistent. The shipowner finally appealed from the denial of defense costs including reasonable counsel fees.

The stevedore appealed from the indemnity award to the shipowner on the ground that an implied warranty of work-

manlike service is not invoked to benefit a shipowner liable solely for its own negligence. It also appealed from the award against it in favor of the crane company on the ground that the award constituted contribution. It further appealed the dismissal of its cross claims against the crane operator for indemnity and contribution and contended that the crane company was solely liable for payment of the plaintiff's recovery or, in the alternative, that the shipowner's recovery against the stevedore and the crane company should be apportioned so that the stevedore pay 15% for the contributory negligence of the longshoreman imputed to it and the crane company pay 85% of the total award.

The crane company appealed on the ground that the crane operator was the borrowed servant of the stevedore so that the crane company is not liable to the longshoreman, the shipowner or the stevedore by way of indemnity or otherwise. The crane company also appealed on the ground that it was error for the Trial Court to grant the longshoreman's motion for a direct action against the crane company without requiring the plaintiff to move pursuant to Rule 14(a) of the Federal Rules of Civil Procedure. The crane company finally appealed on the ground that it was error for the Court to take jurisdiction in the direct action by the longshoreman against the crane company, both citizens of New Jersey, because there was no diversity of citizenship.

Reasons for Granting the Writ

The Court of Appeals erroneously found that in a comparable factual situation this Court has held that the mere reception of signals by a winchman from a stevedore's foreman did not operate to relieve the winchman's employer of liability for the negligence of its employee. *Standard Oil Company* v. *Anderson,* 212 U.S. 215 (1909).

This is not a comparable factual situation because in the *Anderson* case the defendant shipowner preferred to do the work of hoisting a cargo of oil into the vessel and received from the stevedore payment for the hoisting whereas in this case the crane company rented a crane and furnished personnel to the stevedore who paid the crane company for both the crane and the personnel. In these circumstances the crane operator was the employee of the stevedore. The applicable rule is set forth in *Denton* v. *Yazoo & M.V.R. Co.,* 284 U.S. 305 (1932), at page 308:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as a servant of the latter and not of the former."

In the *Denton* case this Court analyzed the case of *Standard Oil Company* v. *Anderson, supra,* at page 310:

> "This court held upon the facts, in the light of the rule which we have just stated and discussed, that the power, the winch, and the winchman were those of the company, and that the company did not furnish *them,* but furnished the *work they did* to the stevedore and this work was done by the company as its own work, by its own instrumentalities and servant under its control."

The distinction is clear. Here, the crane operator was doing the work of the stevedore and was under its direction and control. The stevedore had contracted with the shipowner to discharge the vessel, was in control of the discharge operation and was in control of the crane and crane personnel employed in the operation.

In *McCollum* v. *Smith,* 339 F.2d 348 (9 Cir., 1964) the Court, after citing *Denton* and other cases, stated at page 351:

> "But as the above cases make clear, it is not essen-

> tial, in order to constitute an employee a loaned servant, that the general employer relinquish full control over his employee, or that the special employee be completely subservient to the borrower. While the latter must possess the power of 'authoritative direction and control' over the employee (Standard Oil v. Anderson, supra 212 U.S. at 222) so that his directions will have 'the force of a command' (Denton v. Yazoo, supra, 284 U.S. at 310), this authority need not extend over every incident of an employer-employee relationship but only over the servant's performance of the particular work in which he is engaged at the time of his negligent act or omission."

In *Helton* v. *United States,* 309 F. Supp. 479 (D.C. Arkansas, 1969) the Court stated at p. 484:

> "The 'borrowed servant' doctrine is an old and established doctrine in admiralty. See Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); Park SS Co. v. Cities Service Oil Co., 188 F.2d 804 (2d Cir., 1951), and cases cited therein. The doctrine is equally well established in Arkansas. (citing cases)
>
> "Briefly stated, the borrowed servant doctrine dictates that when a servant in the general employ of one person comes under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as a servant of the latter and not of the former. This is in accord with the general common law of vicarious liability: *one who is in a position to exercise control over the situation giving rise to injury should bear the loss.*"

The borrowed servant rule set forth above is the law in New York. *Hartell* v. *Simonson & Son Co.,* 218 N.Y. 345 (1916); *Parke-Bernet Galleries, Inc.* v. *Franklyn,* 26

N.Y.2d 19; *Moore* v. *Newport Quarries*, 285 App. Div. 640 (4th Dept. 1955). It is also the law in New Jersey where the accident occurred. *Errickson* v. *F. W. Schwiers, Jr., Co.*, 108 N.J.L. 481, 158 Atl. 482 (E & A 1932).

Errickson is particularly apposite here. In that case the general employer of an allegedly negligent derrick operator had rented the derrick and its operator to Hill Dredging Company. Hill employed the plaintiff who was injured when struck by lumber which fell from the lifting sling. Plaintiff claimed that the crane operator remained the employee of his general employer, Schwiers, and sought to impose *respondent superior* liability on Schwiers. The Court, in denying recovery, stated, 108 N.J.L. at 484:

> "The derrick operator had nothing whatever to do with moving the lumber other than to obey the signals given him by the Hill Company's employees, operating the derrick only as and when they told him to do so. We therefore think that the defendant was not an independent contractor and that the operator of the derrick was a fellow employee of the plaintiff, and if negligent in that operation, his negligence cannot be charged against the defendant corporation."

If the shipowner is held in damages by reason of negligent operation of the crane its remedy by way of indemnity or otherwise is against the stevedore liable for the activities of its borrowed servant and not against Hoffman. Similarly, if the shipowner is entitled to indemnity against the stevedore the stevedore may not recover on its cross-claim against Hoffman for the negligence of the stevedore's borrowed servant, the crane operator.

Since the crane operator was ITO's borrowed servant Lopez has no cause of action against Hoffman.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion and amended judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Excerpts from Trial Transcript.

Mr. Blanc: One other aspect of the problem your Honor has not considered but may wish to take into account before entering judgment is the contention of Hoffman throughout this case that the crane operator and the crane oiler were the borrowed servants of ITO. (120) They were under ITO's supervision and control insofar as the discharge of this cargo was concerned; the crane was in good working order and condition; both the operator and the oiler were experienced and for that reason I don't believe that Hoffman can be held solely liable. (121)

The Court: I have just been handed something called "Trial Memorandum on Behalf of Third-Party Defendant Hoffman." (122)

The Court: I have read the Hartnett case, I guess, which is the grain case from Buffalo. I have read the opinion of the Court of Appeals.

In a situation very similar to our own, the Court of Appeals approved an equal division of liability as between parties who correspond to ITO and Hoffman here. (125)

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INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

BRIEF OF RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

As set forth in the as yet unreported opinion of the Court of Appeals:

> "On October 21, 1968, International Terminal Operating Co., Inc. (ITO), a stevedoring company, and Hoffman Rigging and Crane Service, Inc. (Hoffman), the owner and operator of a shoreside crane hired by ITO, were engaged in unloading a cargo of steel beams from the M/V Jobst Oldendorf, a vessel owned by Egan Oldendorf. The vessel was tied up with her portside inshore and her starboard side offshore. Prior to the arrival of the longshoremen, the ship's per-

sonnel removed the lashings and chocks which had secured the stow. The Hoffman crane, operated by Leo Hogan, was driven onto the pier alongside the hatch of the vessel and received instructions from an ITO signalman.

The accident which occasioned this litigation occurred with the removal of the first draft.

The plaintiff Benito Lopez and three other longshoremen secured the first draft with chains and attached them to the cargo hook of the crane. The ITO signalman then instructed Hogan merely to hoist the hook with the cargo attached. Instead, Hogan raised the boom of the crane, causing the draft to drag from the offshore side over to the inshore side. The draft struck and disloged a beam which fell over and onto Lopez's leg."

The Hoffman crane came with two employees of Hoffman, an operator named Hogan and an oiler named Spillane. They testified on trial that they had been hired by Hoffman, were paid their salaries by Hoffman, and had appropriate tax and other deductions withheld from their salaries by Hoffman. They were told by Hoffman where to go to work and what to do. When their services were no longer required, they were released from employment by Hoffman.

They both further testified that they were Hoffman employees and that when they arrived at the pier in the crane on October 21, 1968, they boarded the vessel to determine for themselves how the crane and its boom should be positioned.

The Trial Judge found that the raising of the crane boom by Hogan, without any signal to do so, "caused the

sliding motion inshore of the draft which hit one of the I-beams, which in turn fell on the plaintiff and caused the accident."

Hoffman was held liable to the plaintiff because its employee Hogan operated the crane contrary to the signals being given to him by the ITO signalman. Those findings were affirmed by the Court of Appeals as the above quotation from its opinion indicates.

Hoffman seeks to avoid its liability to the injured longshoreman for the negligence of its employee Hogan by urging that since he was supposed to follow the signals of the signalman he could not be considered as its employee.

POINT I

Hoffman's petition for a Writ of Certiorari appears to be untimely.

The judgment of the Court of Appeals which Hoffman seeks to have reviewed was entered on December 9, 1976. Hoffman never sought rehearing and never moved to amend or modify such judgment. Nor did Hoffman ever move for an extension of time within which to petition for a Writ of Certiorari. Accordingly, it would appear that the time within which Hoffman could properly petition for a Writ of Certiorari would be within 90 days following the aforesaid judgment of December 9, 1976, 28 U.S.C. §2101(c).

The time within which Hoffman could thus petition for a Writ of Certiorari would appear to have expired on March 11, 1977. However, Hoffman's instant petition was not docketed in this Court until April 9, 1977. We believe that petition to be untimely.

POINT II

The sole issue raised by the petition is a factual question of limited application.

It appears to be Hoffman's contention that under the factual circumstances of this case its employee Hogan had passed out of its control and thereby entitles Hoffman to avoid liability for its employees' negligence. That factual contention was decided adversely to Hoffman by both the District Court and the Court of Appeals. It is not believed that such a factual issue commends itself to a review by this Court.

POINT III

In affirming the judgment against Hoffman, the Court of Appeals adhered to the law set forth by this Court.

In rejecting Hoffman's argument that its crane operator Hogan had somehow passed out of its employment because he received signals from an ITO signalman, the Court of Appeals stated:

> "Hoffman argues that it is not liable because its crane operator, Hogan, was the borrowed servant of ITO. However, in a comparable factual setting, the Supreme Court has held that the mere reception of signals by a winchman from a stevedore's foreman did not operate to relieve the winchman's employer of liability for the negligence of its employee. *Standard Oil Co.* v. *Anderson,* 212 U.S. 215 (1909)."

The *Standard Oil* case involved a winchman hired and paid by the defendant, who alone had the right to discharge him (just as Hogan here was hired and paid by Hoffman, who alone had the right to discharge him). In

the *Standard Oil* case the winchman needed hoisting and lowering signals from employees of the stevedore (just as Hogan here needed such signals from an employee of ITO). In the *Standard Oil* case the winchman was negligent because he lowered a draft without receiving a signal to do so (just as Hogan in the instant case was negligent in topping the boom without a signal to do so). In the *Standard Oil* case the giving of signals by employees of the stevedore was urged by the employer of the negligent winchman as constituting a change in employer of the winchman (just as Hoffman is here contending that the signalling by ITO made its negligent crane operator, Hogan, the employee of ITO).

In rejecting such argument by the defendant in the *Standard Oil* case (the same argument here made by Hoffman) the Supreme Court stated:

> "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters."

In *Shenker* v. *Baltimore and Ohio Railroad Company*, 374 U.S. 1, 83 S. Ct. 1667 (1963) the Supreme Court again had occasion to consider the "borrowed servant" doctrine and reaffirmed what it had long before said in *Standard Oil Company* v. *Anderson, supra*, that the giving of signals or directions is only a "minimum cooperation necessary to

carry out a coordinated undertaking" and does not bring about a change in employer status.

Hoffman paid Hogan to operate its crane and it remained Hogan's employer and liable as such for his negligence, *Dornan* v. *U.S.*, 460 F. 2d 425 (1962).

In *Cijeck* v. *Crane Service Company,* 351 F. 2d 788 (1965) the Court considered the problem of *respondent superior* liability when dealing with leased cranes, and it made an interesting distinction. It stated that the crane operator's own general employer is the one liable for that operator's failure to operate with an appropriate degree of care and skill; but that the responsibility might be that of the lessee if the injury were caused not by any negligence of the crane operator in the operation of the crane but rather because of a foolhardy or careless utilization of the crane. In the instant case, we are dealing with a negligent act of the crane operator, Hogan, in topping the boom without having received any signal to do so, and knowing that such a maneuver would cause the draft to swing inshore. For that kind of negligent operation by Hogan, Hoffman is liable in accordance with law well established by this Court.

CONCLUSION

The petition should be denied.

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